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No. 83-1805

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

ALFRED EKANEM, et al.,
Petitioners,

versus

HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

GREGORY J. UTKEN
ROBERTS, RYDER, ROGERS & SCISM
Suite 2020, One Indiana Square
Indianapolis, Indiana 46204
317/639-5656

Counsel for Respondents

Western Newspaper Publishing Co., Inc., 537 E. Ohio St., Indianapolis, IN

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents, Health and Hospital Corporation of Marion County, et al., respectfully pray that this Court deny the Petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Seventh Circuit entered herein on December 14, 1983 as modified on February 7, 1984.

DECISIONS BELOW

1. *Ekanem v. Health and Hospital Corp.*, 589 F.2d 316 (7th Cir. 1978) (reversing grant of preliminary injunction).
2. *Ekanem v. Health and Hospital Corp.*, 24 FEP 1257 (S.D. Ind. 1980) (decision of trial court on the merits of the lawsuit).
3. *Ekanem v. Health and Hospital Corp.*, 724 F.2d 563 (7th Cir. 1983) *modified and rehearing denied*, 33 FEP 1883 (7th Cir. 1984).

COUNTERSTATEMENT OF THE CASE*

Respondents deem the following brief counterstatement necessary to correct inaccuracies in Petitioners' statement of the case.

Ekanem was hired by the Health and Hospital Corporation in October, 1972 as a personnel interviewer but was paid from a borrowed open budget position of clerk-typist. [24 FEP at 1263, ¶33]. He was unemployed and anxious to secure employment because his visa was soon to expire. [24 FEP at 1263, ¶31].

In January, 1975 Ekanem was transferred from the position of Assistant Personnel Director to Deputy Administrator of a community health program. The Corporation made this transfer because (1) Ekanem, a management representative, had openly aligned himself with the Union on issues and (2) he had a Masters Degree in health administration and the Corporation felt his abilities were better suited in a health services administrative position. [24 FEP at 1263, ¶'s 43-46].

On February 11, 1975 Ekanem filed a charge with the EEOC alleging this transfer to be retaliatory. He did not

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* There are 3 reported decisions arising from this litigation referred to herein. "*Ekanem I*" is the Seventh Circuit's opinion reversing a 1978 preliminary injunction. "*Ekanem II*" is the Seventh Circuit's opinion that is the subject of this Writ. Reference to the District Court's opinion after trial is "24 FEP ____".

allege he had been discriminated against because of race. [24 FEP at 1263, ¶48]. Prior to filing his charge, Ekanem had consulted two attorneys. [Tr. p. 189-190, Preliminary Injunction Proceedings, July 6, 1978]. In an affidavit submitted to the District Court, Ekanem stated he considered this transfer to be a promotion. [24 FEP at 1264, ¶50]. *See also, Ekanem I*, 589 F.2d at 320.

In February, 1977 Ekanem and others lost their jobs in the community health program because of a phase-out of that program when the City of Indianapolis did not renew its contract with the Corporation. [24 FEP at 1274, ¶194]; *Ekanem I*, 589 F.2d at 320; *Ekanem II*, 724 F.2d at 569-70. This job loss was found to be non-discriminatory and non-retaliatory.

On August 26, 1980 the District Court certified 10 class claims and excluded applicants and potential applicants from the class. The class was also limited in time period to 300 days before the filing of the first appropriate EEOC charge under Title VII and 2 years before the filing of the suit under 42 U.S.C. §1981 and §1983. [24 FEP at 1269-70, ¶'s 140-142].

At trial, the District Court found against all four Plaintiffs on the merits of each of their individual claims. The Seventh Circuit affirmed these findings. *Ekanem II*.

The District Court also found there was no proper class representative under Title VII for the following class claims: promotions, classification, pay, assignment of jobs, denial of advancement through operation of a seniority system, selection for supervisory positions and application of educational criteria for selection into salaried positions. This was based upon the fact that neither of the two black Plaintiffs ever filed an EEOC charge alleging race discrimination against them on those issues nor had either alleged an individual claim in the judicial complaint on these bases. [24 FEP at 1276, ¶209]. This was affirmed by the Seventh Circuit. *Ekanem II*. In addition, the District Court considered the evidence on the merits of each of those class

claims and found for the Defendants. [24 FEP at 1277-78, ¶'s 213, 214, 216-220, 223-224].

As to the same class claims under 42 U.S.C. §1981 and other statutes, the District Court found Ekanem was not a proper class representative because he had never alleged an individual claim in his judicial complaint on those grounds, [24 FEP at 1276, ¶209], and also that the claims failed on their merits. [24 FEP at 1277-78, ¶'s 213-224 and 226].

As to the class claims for which there were proper class representatives (denial of transfer, testing, discipline and discharge), the District Court dismissed them on their merits. [24 FEP at 1277-78, ¶'s 215, 221, and 222]. This was affirmed by the Seventh Circuit. *Ekanem II*.

SUMMARY OF ARGUMENTS

I

A.

There is no inter-circuit conflict on the scope of an EEOC charge and judicial complaint and Ekanem only disagrees with the District Court's finding which was affirmed by the Seventh Circuit.

B.

Even applying the standard Ekanem suggests for granting of the Writ, his argument fails.

C.

There is no conflict within the Seventh Circuit and an inner-circuit conflict is not an appropriate basis for granting the Writ.

D.

Ekanem was not a proper class representative since he never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay.

E.

The District Court did not apply an erroneous legal stan-

dard in judging the evidence on pay discrimination and it ruled against that claim on the merits.

F.

Unfairness of the lower court's decision is not a proper ground to grant the Writ.

II

Remand of the case under 42 U.S.C. §1981 §1983 was not necessary because Ekanem never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay and the District Court found against that class claim on the merits.

III

The Seventh Circuit's opinion on the First Amendment issue is not in conflict with this Court's decisions.

ARGUMENT

I

A.

The Writ should be denied on the issue of the scope of Ekanem's EEOC charge and judicial complaint because there is no inter-circuit conflict on that question and Ekanem simply disagrees with the District Court's finding which was affirmed by the Seventh Circuit.

The first of three bases that Ekanem cites for granting his Writ is that there is a conflict among the Circuits on the permissible scope of a judicial complaint founded upon an EEOC charge. This contention is inaccurate.

Ekanem cites cases from four Circuits and alleges that the Seventh Circuit's opinion conflicts with them. However, those cases applied the same legal principle which has been called the *Sanchez* doctrine after the case of *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). The Seventh Circuit also follows this doctrine. *Jenkins v. Blue Cross Mutual Hospital Insurance*, 538 F.2d 164 (7th Cir. 1976).

In substance, this legal principle is that a judicial com-

plaint under Title VII (42 U.S.C. §2000e, *et seq.*) may cover allegations of discrimination stated in the Plaintiff's EEOC charge as well as other allegations of discrimination that are "like and related" to those in the EEOC charge. None of the cases cited by Ekanem states any other principle and thus there is no inter-circuit conflict. Furthermore, each case cited by Ekanem is distinguishable on its facts.

Ekanem simply seeks to challenge the District Court's finding that he never filed an individual claim of race discrimination with the EEOC over his pay or with respect to the Corporation's pay practices towards blacks in general. As a result, the District Court held that Ekanem was not a proper class representative for alleged pay discrimination against blacks. [24 FEP at 1276, ¶209]. The Seventh Circuit affirmed this finding. *Ekanem II*, 724 F.2d at 573.

Ekanem argues in his Petition that the Seventh Circuit's ruling was "clearly erroneous". [Petition, p. 15]. However, the standards for granting a Writ of Certiorari are not the same as the standards used by appellate courts in reviewing a district court's decision. The Seventh Circuit applied a clearly erroneous standard to the review of the District Court's decision. It did not find the holding that Ekanem never filed an EEOC charge alleging individual race discrimination in pay was clearly erroneous. Ekanem now argues that the Seventh Circuit's opinion is "clearly erroneous", but that is not one of the standards for granting a Writ. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts".).

Whether allegations of a Title VII judicial complaint are "like and related" to Plaintiff's EEOC charge is a factual determination. The facts were found against Ekanem and affirmed on appeal. The Seventh Circuit's determination turns on facts peculiar to Ekanem's case. By disagreeing with that determination, Ekanem does not raise an issue for which the Writ should be granted.

B.

Even Applying Ekanem's clearly erroneous standard for granting of the Writ, his argument fails.

Assuming *arguendo*, a clearly erroneous test is proper, a review of the facts reveals that Ekanem's argument fails even applying that standard.

Ekanem was a highly educated individual with a Masters Degree and a claimed specialty in labor relations. [Petition p. 4]. He alleged he was transferred involuntarily to another job in 1975. Before he challenged that action, he consulted with two attorneys. [Tr. pp. 189-190, Q. 595-601; Preliminary Injunction Proceedings of July 6, 1978].[1] When he filed his February, 1975 EEOC charge, not only did Ekanem not check the box marked "race or color" but a box for "704(a)"[2] was handwritten in and check-marked. [Petitioner's App. p. A-83]. This all suggests the conscious act of an intelligent individual.

The body of the EEOC charge (which *Sanchez* and its progeny note is the "crucial" element, *Sanchez*, *supra*; *Price v.*

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1. The text of that testimony by Ekanem during the preliminary injunction hearing was as follows:

"Q. At the time that you made this transfer I believe you testified earlier you did file a charge with the EEOC about this matter, is that not correct?

A. Correct.

Q. At that time did you contact any attorneys about this problem?

A. Yes, I did.

Q. Who would that be?

A. Mr. Fasig.

* * *

Q. Did you contact any other attorneys about the matter?

A. Mr. Perry Harrold.

Q. Now, is the reason for your contacting these individuals concerning this transfer?

A. That was part of it."

2. § 704(a) of Title VII (42 U.S.C. § 2000e-3) prohibits retaliation for protesting any practice unlawful under Title VII or because of participation in Title VII proceedings.

Southwestern Bell Telephone Co., 687 F.2d 74 (5th Cir. 1982)), does not even allege race discrimination in pay. The charge, [Petitioner's App. p. A-83], fairly read, alleged Ekanem was discharged from one job and involuntarily transferred to another "because I was an advocate of employees who were treated unfairly." The charge says that the employees were "mostly black." That obviously suggests there were employees who were white for which he was also an advocate. Thus, he apparently thought employees (both black and white) were treated unfairly. This is borne out by the fact that of the four Plaintiffs, two were white and two were black. *Ekanem II*, 724 F.2d at 567.

The Seventh Circuit noted in overturning the 1978 preliminary injunction that although Ekanem alleged this change of job to be an involuntary transfer, the facts as presented to the District Court by Ekanem were that he considered it, in fact, a promotion and received a $3,000 pay increase. *Ekanem I*, 589 F.2d at 320. ["Even Ekanem considered his transfer from the personnel position to that of Deputy Administrator of CDHP to be a promotion. (Defendants' App. 3)"]. *See also*, 24 FEP at 1264, ¶50.

Furthermore, the EEOC's determination on that charge indicated no investigation into racially discriminatory pay practices but rather found retaliation. This was also observed by the Seventh Circuit in its first opinion, *Ekanem I*, 589 F.2d at 317 and most recent opinion, *Ekanem II*, 724 F.2d at 573.

Based on these facts,[3] it was not "clearly erroneous" for the Seventh Circuit to conclude that Ekanem never made a claim of race discrimination with respect to his pay or with respect to blacks generally and therefore, he could not be a proper class representative for alleged racially discriminatory pay practices.

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3. Ekanem's argument focuses on the fact he did not check the "race or color" box. However, it is apparent that the Seventh Circuit relied on more than just that fact in reaching its conclusion in *Ekanem II*.

The Writ should also be denied on this issue because there is no conflict within the Seventh Circuit and, further, a claimed inner-circuit conflict is not an appropriate basis for granting a writ.

A second basis Ekanem espouses for granting his Writ is that there is a conflict among cases within the Seventh Circuit on this point. Again, this is inaccurate.

The Seventh Circuit in the instant case, as well as in the two cases cited by Ekanem, *Roesel v. Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979); *Jenkins v. Blue Cross Mutual Hospital Insurance*, 538 F.2d 164 (7th Cir. 1976), applied the *Sanchez*-type principle of "like and related". Thus, there is no conflict within the Seventh Circuit about the legal principle to apply in determining the scope of a judicial complaint founded upon an EEOC charge.

Furthermore, even assuming *arguendo* that such an inner-circuit conflict did exist, that is not a proper basis to grant a Writ. Conflicts among the Circuits, not within a Circuit, is one of the measuring standards. Rehearing at the Circuit Court is the appropriate process for addressing inner-circuit conflicts. Ekanem's request for a rehearing *en banc* was denied. 33 FEP 1883 (7th Cir. 1984).

D.

Irrespective of Ekanem's contentions on the "like and related" principle, the Writ should be denied because there was a more compelling reason for finding he was not a proper class representative—he never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay.

Even assuming the validity of Ekanem's arguments on the "like and related" issue, it is inappropriate to grant the Writ because there was another and even more compelling reason why he was held not to be a proper class representative on the issue of pay. He never alleged in his judicial complaint (which was amended three times) that he had

been discriminated against because of his race with respect to his pay.

The Complaint that went to trial was Ekanem's Third Amended Complaint. [Respondent App. p. 1-12]. Rhetorical paragraph 6 of that Complaint set forth the individual allegations of Ekanem. [Respondent's App. p. 3-4, ¶6]. Nowhere within that paragraph did Ekanem allege that he had been discriminated against with respect to his pay due to race. The District Court outlined Ekanem's individual claims. Race discrimination in pay was not one of them. [24 FEP at 1260, ¶8(a)]. The District Court found that Ekanem never even alleged in his judicial complaint that he had been racially discriminated against in his pay and therefore, on that basis also, he was an improper class representative on that claim. [24 FEP at 1276, ¶209]. The Seventh Circuit also observed this, *Ekanem II*, 724 F.2d at 573, and did not find it to be clearly erroneous.

This Court has made it clear that a class representative must have suffered the same or similar injury as members of the class he seeks to represent. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395, 403-04 (1977). If a plaintiff never filed an EEOC charge alleging something to be a discriminatory practice towards him, a claim that such practice is discriminatory against a class cannot be pursued because plaintiff is not a proper class representative for that claim. *Movement for Equality v. Detroit Diesel*, 18 FEP 557, 566 (S.D. Ind. 1978), *aff'd*, 622 F.2d 1235 (7th Cir. 1980).

While a plaintiff who claims one type of discrimination in his EEOC charge may be permitted to litigate an allegation of different but "like and related" discrimination in his judicial complaint, he certainly may not litigate, nor be a proper class representative for, a discrimination claim he never even alleged in his lawsuit.

Ekanem was not a proper class representative for race discrimination in pay practices not only because he never filed a charge with the EEOC on that point but also, and

more compellingly, because he did not even allege such a claim in his judicial complaint. Therefore, the Writ should be denied.

E.

It is of no moment if the Seventh Circuit erred in holding Ekanem was not a proper class representative for pay discrimination claims since the District Court did not apply an erroneous legal standard in judging the evidence on pay discrimination and it ruled against that claim on the mertis.

Ekanem argued to the Seventh Circuit and argues to this Court that the class issue on pay should have been remanded.

This is based on a claim that the District Court applied an inappropriate legal standard in considering statistical evidence. This contention is founded upon a statement made during trial wherein the District Court indicated it elected not to predicate a ruling on Ekanem's statistical evidence because it confined its analysis to the work force within the Corporation and gave no consideration to the availability of qualified personnel in the work force of the metropolitan district. The Seventh Circuit found this to be an error and stated:

> "Given this error and the district court's failure to take into account evidence, factors and job classification and years of service, we ordinarily would remand for supplemental findings applying the correct legal principles."

Ekanem II, 724 F.2d at 572. Although the decision was affirmed in their favor, Respondents' petitioned for rehearing on whether the District Court applied an erroneous legal principle in evaluating class evidence, because Ekanem petitioned for rehearing on whether he was a proper class representative for pay claims. Respondents contended that if the Appellate Court granted Ekanem's petition for rehearing on the issue of proper class representation that there was no need to remand the case for supplemental findings.

While it is true that the District Court made such a statement at trial, it is not true that there was anything in its written opinion which indicates that it applied any erroneous legal principle to the class claims on which statistical evidence was presented.

Ekanem presented statistical evidence on only three class issues: job assignment [24 FEP at 1271, ¶154]; pay [24 FEP at 1272-73, ¶'s 170-173]; and classification [24 FEP at 1273, ¶174]. No statistical evidence was presented by Ekanem on the class issues of transfer/advancement through a seniority system [24 FEP at 1271, ¶159], supervision [24 FEP at 1271, ¶161], application of educational criteria for selection of salaried positions [24 FEP at 1272, ¶163], promotions [24 FEP at 1272, ¶165], disciplinary actions and discharges [24 FEP at 1273, ¶179], or testing [24 FEP at 1273, ¶185].

Thus, the only class claims the District Court had to analyze in view of statistical evidence offered by Ekanem were (1) initial job assignment, (2) pay, and (3) classification.

The District Court's analysis of the evidence with respect to job assignment and classification is found in 24 FEP at 1271, ¶'s 153-156 and 24 FEP at 1273, ¶'s 174-177. Ekanem contended that Respondents discriminated against blacks with respect to initial job assignment and in classifications to which they were assigned. In analyzing those claims, it is appropriate to look to the availability of blacks in the outside labor market, not the availability of blacks within the Corporation. The District Court noted this in its written findings. [24 FEP at 1271, ¶154 and 24 FEP at 1273, ¶175]. Thus, with respect to these two class claims, the comment from the bench was accurate.

On the only other class issue involving statistical evidence—pay—the District Court did *not* impose a requirement of comparison to the outside labor force. In fact, the District Court did precisely that which the Seventh Circuit's decision claimed that it did not do. In paragraph 170 of its opinion, [24 FEP at 1272], the District Court found that the exhibits showing that corporate-wide, on average, blacks made less than whites co-mingled different labor

grades as well as many hundreds of different jobs. It went on to note in paragraphs 171 and 172, [24 FEP at 1272-73], that when the statistics were adjusted for "*job category*" and "*for seniority*," (emphasis added) Ekanem's own expert testified that in the majority of cases race was *not* a factor. Thus, the District Court *did* take into account evidence of job classification and years of service as a basis for rejecting Ekanem's statistical evidence on the class issue of pay. [24 FEP at 1277, ¶219].

The District Court's statement during trial was appropriate for class claims of initial job assignment and classification. Furthermore, its written findings show that it applied the proper legal principles with respect to those class claims upon which statistical evidence was presented. Thus, there was no need to remand the case. It had already taken into account evidence of job classification and years of service. Supplemental findings were not necessary.

F.

The fact that Petitioner feels that the lower court's decision was unfair is not a proper ground to grant the Writ.

A third reason Ekanem claims his Writ should be granted is that he believes the Seventh Circuit's decision is unfair.[4] To accept such a standard would be to encourage every losing litigant to file a Petition for Writ of Certioriari. Clearly, this is not an appropriate consideration to suggest as a basis for granting the Writ.

II

The Writ should be denied on the issue of the Appellate Court's refusal to remand the case and the claimed unlawful denial of class relief under 42 U.S.C. §1981

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4. In his Petition, Ekanem alleges there were over 100 class members who never filed charges of discrimination with the EEOC because of the pendency of this lawsuit. Respondents submit there is nothing in the record of the District Court or the Court of Appeals to support such an allegation.

and §1983 because Ekanem never alleged in his judicial complaint that he had been discriminated against on the basis of race with respect to his pay and the District Court found against that class claim on the merits.

Ekanem also seeks to have the Writ granted on the grounds that the Seventh Circuit's refusal to remand the case after finding the District Court had applied an erroneous legal principle denied Ekanem and the class relief to which they were entitled under 42 U.S.C. §1981 and §1983. He bases this on the fact that claims under Title VII and 42 U.S.C. §1981 are independent.

Initially, it must be noted that the District Court found Ekanem was not a proper class representative for the claims at issue here under 42 U.S.C. §1981 and §1983 either. This is for the same reasons cited in section I(D) above. Nowhere in paragraph 6 of Ekanem's judicial complaint did he allege that he was discriminated against with respect to his pay on the basis of race. Thus, irrespective of race. Thus, irrespective of whether he filed a such a claim with the EEOC under Title VII, he cannot be a proper class representative for claimed race discrimination in pay practices under other statutes either since he never alleged in his judicial complaint that he had been discriminated against on such a basis. *Falcon* and *Rodriguez, supra.* The District Court so found. [24 FEP at 1276, ¶209]. Therefore, it was appropriate for the Seventh Circuit not to remand the case.

Not only was Ekanem an improper class representative for racial pay claims under 42 U.S.C. §1981 and §1983, but for the reasons stated in section I(E) above, it is clear that the District Court did not apply an erroneous legal standard, but actually considered at length the statistical evidence with respect to the class pay claim. [24 FEP at 1272-73, ¶'s 170-173]. In fact, the District Court found that the evidence presented by Ekanem on the class pay claim supported the Defendants. It concluded each of the class claims under 42 U.S.C. §1981 and other statutes failed on their merits. [24 FEP at 1277, ¶226].

Therefore, it is of no moment that claims under Title VII and 42 U.S.C. §1981 and §1983 are independent. The lower court found Ekanem was not a proper class representative under those latter statutes because he never alleged in his judicial complaint an individual claim of race discrimination in pay. Furthermore, even if he was a proper representative, the District Court ruled against Ekanem on the merits of that claim.

III

The Writ should be denied on the issue of the First Amendment because the Seventh Circuit's opinion is not contrary to and in conflict with this Court's decisions.

Ekanem asserts that the Seventh Circuit's decision as to his First Amendment claims is contrary to and in conflict with earlier Seventh Circuit and Supreme Court decisions. He contends the Seventh Circuit rejected his First Amendment argument based upon its conclusion that "privately expressed opinions regarding his public employment are not entitled to First Amendment protection...." [Petition p. 19]. This assertion, however, totally misrepresents the Seventh Circuit's reason for denying Ekanem's First Amendment claim.

Nowhere in its decision did the Seventh Circuit state or imply that a public employee loses the protection of the First Amendment if his protected speech occurs in private rather than in public. Instead, the Seventh Circuit focused on whether Ekanem's allegedly protected speech involved matters of *public concern* so as to warrant First Amendment protection. The court stated:

> "Ekanem's contention that his conduct was protected by the first amendment is also without merit. Ekanem's May 1979 memorandum to Dr. Johnson, which defendants acknowledge was 'the trigger event for his termination,' clearly dealt with internal matters concerning the reorganization of Dr. Johnson's department and Ekanem's proposal for a new position that would give him broader supervisory powers and a

> higher salary. *The memorandum did not comment on matters of public concern such as to warrant first amendment protection.*

Ekanem II, 724 F.2d at 571 (Emphasis added).

The Supreme Court has addressed the issue of whether matters of purely private concern to a public employee should be entitled to First Amendment protection. In *Connick v. Meyers*, ____ U.S. ____, 103 S.Ct. 1684, 1689 (1983), this Court held:

> "*Pickering*, its anticedents and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge."

The Seventh Circuit's opinion in this case has a specific citation to *Connick, supra.*, as authority for the proposition that a threshold issue in the Ekanem-type of First Amendment case is a determination whether the allegedly protected speech involved matters of public concern. Thus, the Seventh Circuit's decision as to Ekanem's First Amendment claims was in accordance with clear precedent by this Court.

CONCLUSION

Petitioner has failed to articulate any reasons or considerations of the character specified in Supreme Court Rule 17 that would suggest the Court should exercise its judicial discretion and grant review. Furthermore, when one scrutinizes the appropriate considerations it is abundantly clear that the Writ of Certiorari should be denied.

Respectfully submitted,

Gregory J. Utken
Roberts, Ryder, Rogers & Scism
Suite 2020, One Indiana Square
Indianapolis, Indiana 46204
317/639-5656

Counsel for Respondents

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ALFRED EKANEM, et al.,

Plaintiffs,

vs.

THE HEALTH AND HOSPITAL CORPORATION OF MARION COUNTY, INDIANA, et al.,

Defendants.

Civil Action No.
IP 77-224-C

THIRD AMENDED COMPLAINT

Plaintiffs complain of defendants, and each of them, and allege as follows:

COUNT I

Jurisdiction

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343(3)(4), 42 U.S.C. §2000e-5(f), 28 U.S.C. §§ 2201 and 2202, the First, Thirteenth and Fourteenth Amendments to the Constitution of the United States, and 42 U.S.C. §§ 1981, 1983, 1985(3) and 1988. The jurisdiction of this Court is invoked to secure protection of and redress deprivation of rights secured by (a) 42 U.S.C. §§2000e et. seq., providing for injunctive, and other relief from racial, color, national origin and other discrimination in the terms and conditions of training and employment, and (b) 42 U.S.C. §1981, providing for the equal rights of all persons in every State and Territory within the jurisdiction of the United States to contract.

2. This is a proceeding for a declaratory judgment as to the plaintiffs' rights, and for preliminary and permanent injunctions, restraining the defendants from maintaining and continuing discriminatory action against the plaintiffs because of their race, color and national origin and because of their opposition to the defendants' conduct which equal unlawful employment practices under 42 U.S.C. §§2000e-20002 15 and because of their charges filed under said act and their parti-

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cipation in the proceedings instituted. The conduct which plaintiffs request this Court to enjoin are discriminatory hiring practices, discriminatory promotion and transfer practices, discriminatory classification and pay practices, discriminatory discharge practices, discriminatory testing practices, discriminatory recruiting practices, and discriminatory disciplinary and demotion practices, all of which deprive plaintiffs and the class they represent of all rights to benefits and employment opportunities to which they are entitled.

Class Allegations

3. Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of all persons who have been punished, permitted to be punished, retaliated against, disciplined or permitted to be disciplined because they opposed employment practices engaged in by defendants which were made unlawful by the Title VII of the Civil Rights Act of 1964, as amended, since July 2, 1965, all black employees who were employed by the defendant company on July 2, 1965, or at any time thereafter, or who may in the future be employed, and all black persons who applied for employment with defendant company on July 2, 1965, or any time thereafter, or who may in the future apply for employment, and only those applicants for employment, who have been or may be adversely affected by any of the following practices:

1. Discrimination against blacks in the hiring of salaried employees.
2. Discrimination against black employees in assignment of jobs.
3. Discrimination against black employees in the denial of job transfer and advancement through the operation of the seniority system.
4. Discrimination against black employees in the selection for supervisory positions.
5. Discrimination against black employees and

applicants in the application of enducational criteria for selection into salaried positions.

6. Discrimination against black salaried employees in promotions.

4. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race, color and national origin. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

5. This is a proceeding for a declaratory judgment as to plaintiffs' rights and for a permanent injunction, restraining defendants from maintaining a policy, practice, custom or usage of discriminating against plaintiffs and other black persons in this class because of race, color and national origin with respect to compensation, terms, conditions and privileges of employment and in ways which deprive plaintiffs and other persons in the class of equal employment opportunities and otherwise adversely affect their status as employees because of race, color and national origin. This complaint also seeks restitution to plaintiffs and the class they represent of all rights, privileges, benefits and income that would have been received by them but for defendants' unlawful and discriminatory practices.

Individual Plaintiffs

6. Alfred Ekanem, is a black male who resides in Indianapolis, Indiana. He was employed by defendant, Health and Hospital Corporation of Marion County, Indiana, in October of 1972, as a clerk typist, at which time he held a Master's Degree in Health and Hospital Administration with a specialty in Labor Relations. He continued in the employment of defendant,

Health and Hospital Corporation of Marion County, Indiana, until February 2, 1977, when he was unlawfully discharged because of his race, color and national origin and because he opposed the discriminatory employment practices of defendants, which are violative of the Civil Rights Act of 1964, as amended. In December, 1974, Alfred Ekanem was subjected to discriminatory involuntary transfer and demoted. Also, Alfred Ekanem was subjected to discriminatory testing requirements and procedures. On or about February 11, 1975, Alfred Ekanem filed charges of race discrimination and retaliation against defendants with the Equal Employment Opportunity Commission. On February 7, 1977, Alfred Ekanem filed a supplemental charge of retaliation against defendants with the Equal Employment Opportunity Commission and requested a right to sue letter. On March 3, 1977, the Equal Employment Opportunity Commission issued its determination that there is reasonable cause to believe that respondent, Health and Hospital Corporation of Marion County, Indiana, is engaging in unlawful employment practices. On April 15, 1977, the United States Department of Justice issued a notice of right to sue to Alfred Ekanem. Between November, 1978 and June, 1979, the defendant, Health and Hospital Corporation of Marion County, Indiana, continued to intimidate and harass the plaintiff, Alfred Ekanem, said defendant, Health and Hospital Corporation, also retaliated against plaintiff Ekanem during said period of time in violation of the Civil Rights Act of 1964, as amended. In addition thereto, defendant violated plaintiff Ekanem's right to freedom of speech and expression as guaranteed by the First Amendment to the Constitution of the United States. Retaliation referred to herein culminated in plaintiff Ekanem's discharge from his employment with the Health and Hospital Corporation on or about June 10, 1980. Plaintiff Ekanem filed charges of retaliation with the Equal Employment Opportunity Commission on November 21, 1979.

7. Linda Murray Marshall resides in Indianapolis, Indiana,

and is a citizen of the United States. She was employed by the defendant, Health and Hospital Corporation of Marion County, Indiana, on February 2, 1970. In 1974 Linda Marshall opposed the discriminatory employment practices of the Health and Hospital Corporation. She filed charges on that basis in 1974 against defendants before the Equal Employment Opportunity Commission. On February 2, 1977, Linda Marshall was discharged by the defendant, Health and Hospital Corporation of Marion County, Indiana, because she opposed the discriminatory employment practices of the defendants. On February 7, 1977, Linda Marshall filed supplemental charges of retaliation against the Health and Hospital Corporation of Marion County, Indiana. Also, Linda Marshall was continuously denied performance evaluations, raises and harassed by the officials of Health and Hospital Corporation. Unwarranted and negative memos were placed in her personnel file. She was given burdensome assignments and a volume of work normally assigned to 2-3 persons. Plaintiff, Linda Marshall, was unfairly denied earned benefits such as vacation.

8. Toni Hardiman Spicer is a black female who resides in Indianapolis, Indiana, and is a former employee of defendant, Health and Hospital Corporation of Marion County, Indiana. Toni Spicer was discriminatorily discharged by Health and Hospital Corporation on or about August 2, 1974. On August 5, 1974, she filed charges against the Health and Hospital Corporation (Marion County General Hospital, now Wishard Memorial Hospital) alleging unlawful and discriminatory employment practices. On January 18, 1977, Toni Spicer received a notice of right to sue issued by the United States Department of Justice.

9. Donald Kemp is a white male citizen who resides in Indianapolis, Indiana. He was employed by the defendant, Health and Hospital Corporation of Marion County, Indiana, on June 1, 1971. He opposed the unlawful and discriminatory

employment practices of the defendants. He was subjected to discriminatory and retaliatory treatment by the defendant, Health and Hospital Corporation, because he opposed the discriminatory employment practices conducted by the defendants. In 1974 he filed charges against the defendant, Health and Hospital Corporation, with the Equal Employment Opportunity Commission because of defendants' retaliatory actions against him. On Feburary 2, 1977, Donald Kemp was discharged by the Health and Hospital Corporation of Marion County, Indiana, because he opposed the practices of the defendants, which were discriminatory and violative of the Civil Rights Act of 1964, as amended. Prior to Donald Kemp's discharge he was subject to unlawful demotions. On February 7, 1977, Donald Kemp filed supplemental charges of retaliation against the Health and Hospital Corporation of Marion County, Indiana.

10. Alfred Ekanem held a position of Deputy Administrator of the Community Development Health Programs of the Health and Hospital Corporation at the time of his unlawful discharge on February 2, 1977. Previously Alfred Ekanem worked as Assistant Personnel Director of the Health and Hospital Corporation assigned to Wishard Memorial Hospital. Donald T. Kemp held a position of Health Project Associate for the Community Development Health Programs of the Health and Hospital Corporation. Toni Spicer served as a telephone operator assigned to Wishard Memorial Hospital immediately prior to the time of her discharge. Linda Murray Marshall held a position of Administrative Secretary of the Community Development Health Programs of the Health and Hospital Corporation on February 2, 1977. Prior to that time she worked as an Information Clerk assigned to Wishard Memorial Hospital.

Defendants

11. The Health and Hospital Corporation of Marion County, Indiana, is a municipal corporation and was created by the Acts of Indiana 1951, Chapter 287 as amended, and supplemented, to

administer Public Hospitals and to control Public Health problems and to offer public health services. Section 2 of Chapter 287 of Acts of Indiana 1951 provides that the municipal corporation may be sued in its own name and may contract and be contracted with.

12. The executive and legislative businesses of the corporation are executed by a Board of Trustees. Such Board is empowered by Indiana Acts of 1951, Chapter 287 as amended, to create divisions and appoint an Executive Director and to appoint a Director over each division.

13. The Board created the Division of Public Health, Dr. Frank Johnson is its present Director.

14. The Board created the Division of Public Hospitals, of which Wishard Memorial Hospital is a part, and Dr. Van Hoek is Superintendent and Medical Director of such division. Also, Regenstrief is a unit of the Division of Public Hospitals and Richard Laird is its Administrator.

15. The Board, pursuant to appropriate authority, has created a Personnel Division; Mrs. Leo Vorbis is the present Director of such Personnel Division.

16. The Health and Hospital Corporation of Marion County, Indiana, is located in Indianapolis, Indiana, at 1941 City-County Building and maintains various facilities throughout Marion County, Indiana, and designed to offer health care. Defendant, Health and Hospital Corporation and each of its Divisions named defendants herein, are employers within the meaning of the Civil Rights Act of 1964, as amended.

17. Indiana University is a school of higher education created by the legislature to offer courses of study on the college and university level. Indiana University School of Medicine is a division of Indiana University and was created to offer a course of medical education and in the course thereof, to offer certain medical care. Steven C. Beering, M.D., is the Dean of Indiana University School of Medicine. Indiana University School of Medicine is presently managing and operating

Wishard Memorial Hospital pursuant to the terms of a contract with the Health and Hospital Corporation of Marion County, Indiana, defendant herein. Said Indiana University and Indiana University School of Medicine are joined as defendants herein in order to secure complete relief for the plaintiffs and in order to provide Indiana University and Indiana University School of Medicine the opportunity to appear and defend to the extent that its interests may appear.

18. Defendants have denied plaintiff, Alfred Ekanem employment on the same basis as is afforded to white persons and have retaliated against plaintiff Ekanem because he opposed their practices which are discriminatory under the Civil Rights Act of 1964, as amended, and because he filed charges against the defendants of racial discrimination and retaliatory charges and has otherwise protested defendants' unlawful practices.

19. Defendants have discriminated against plaintiff Spicer by denying her promotion, salary increases, and by placing unwarranted and discriminatory evaluations in her file without her knowledge and by unlawfully discharging her.

20. Defendants have discriminated against plaintiffs Kemp and Marshall by subjecting them to retaliatory measures, including discharge, because they opposed and protested defendants' unlawful practices of employment discrimination as recited herein.

21. Defendants, in violation of the provisions of Title VII of the Civil Rights Act of 1964, have denied and continue to deny plaintiffs and the class they represent, equal opportunity for employment because of their race, color and national origin.

22. Each defendant has engaged and is engaging in the following unlawful practices:

1. Discrimination against blacks in the hiring of salaried employees.

2. Discrimination against black employees in assignment of jobs.

3. Discrimination against black employees in the denial of job transfer and advancement through the operation of the seniority system.

4. Discrimination against black employees in the selection for supervisory positions.

5. Discrimination against black employees and applicants in the application of educational criteriaffor selection into salaried positions.

6. Discrimination against black salaried employees in promotions.

23. The purpose, intent and effect of the acts set forth above are to deny the classes hereinabove described equal opportunity for employment.

24. The plaintiffs and the class they represent have suffered and will continue to suffer irreparable harm and injury as a result of the past and present discriminatory employment practices of defendants based on race, color and national origin. The plaintiffs and the class they represent have no adequate plain of speedy remedy at law.

Second Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent, allege as follows:

25. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

26. Defendants have discriminated against plaintiffs in violation of rights secured to them by the Thirteenth Amendment to the United States Constitution and by 42 U.S.C. §1981.

Third Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

27. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

28. Defendants have discriminated against plaintiffs, in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution and by 42 U.S.C. §1983.

Fourth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

29. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

30. Defendants have discriminated against plaintiffs, in violation of rights secured to them by 42 U.S.C. §1985(3).

Fifth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, and the class they represent allege as follows:

31. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

32. Defendants have discriminated against plaintiffs, in violation of rights secured to them by 42 U.S.C. §1988.

33. Each right to sue letter mentioned herein is attached hereto.

Sixth Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp,,Linda Marshall and Toni Spicer and the class they represent allege as follows:

34. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

35. The employment practices of defendants, more particularly described above, denied and continue to deny plaintiffs and the class they represent, equal employment opportunity within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.

36. The plaintiffs and the class which they represent exhausted all administrative requirements under Title VII.

37. On or about May 9, 1978, the United States Department of Justice issued a Notice of Right to Sue against defen-

dant, Marion County Health and Hospital Corporation, on the charges of employment discrimination, including retaliation, to Donald Kemp, plaintiff. Such charges were filed with EEOC on February 7, 1977.

38. On or about April 27, 1978, the United States Department of Justice issued Notices of Right to Sue against defendant, Marion County Health and Hospital Corporation, on the charges of employment discrimination, including retaliation, to plaintiffs, Alfred Ekanem and Linda Marshall. Such charges were filed with EEOC on February 7, 1977.

39. The defendants unlawfully retaliated against the plaintiffs within the meaning of §704 of Title VII.

Seventh Cause of Action

Plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer and the class they represent allege as follows:

40. Repeat and reallege rhetorical paragraphs numbered one (1) through twenty-four (24) with the same force as if fully stated herein.

41. Defendants have discriminated against plaintiffs, in violation of rights secured to them by the First Amendment to the United States Constitution.

WHEREFORE, plaintiffs pray this Court to advance this case on the docket, order a speedy hearing at the earliest practical date, and cause this case to be in every way expedited, and after such hearing to:

(a) Enter a declaratory judgment that the practices complained herein are unlawful and in violation of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1866;

(b) Permanently enjoin the defendants, their agents, successors, employees, attorneys and those acting in concert with the defendants, from engaging in each of the unlawful practices and policies;

(c) Modify unlawful practices and policies set forth herein and any other practice shown to be in violation of applicable law so that they do not discriminate on the basis of race, color, or national origin;

(d) Assign plaintiffs the positions they would now be occupying but for the discriminatory practice of defendant;

(e) Award the plaintiffs the cost and disbursements of this action including, but not limited to, reasonable attorney fees;

(f) That the defendants be required to reinstate plaintiffs, Alfred Ekanem, Donald Kemp, Linda Marshall and Toni Spicer, to their employment immediately and grant full back pay following a hearing and on such terms as the Court deems just; and to allow punitive and compensatory damages.

(g) That the Court award preliminary costs and fees to the plaintiffs;

(h) Grant such other relief that may be just and proper.

Respectfully submitted,

John O. Moss
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been mailed to the following attorney of record, this ___ day of September, 1980.

Michael W. Owen, Esq.
Gregory J. Utken, Esq.
One Indiana Square, Suite 2020
Indianapolis, Indiana 46204

John O. Moss
Attorney for Plaintiffs